Supreme Court, U.S.
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No. 88-1465

In the Supreme Court of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF GREGORY TIMBER RESOURCES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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ARGUMENT

The Government presents new matter on three points: (1) waiver, (2) constitutionality of denial of an Article III trial, and (3) the failure of the contracting officers (CO's) to exercise any discretion when considering extension requests. None of the Government's new matter warrants denial of certiorari.

1. The Government concedes that the Federal Circuit erred in its conclusion of waiver. Br in Opp 4 n. 1. The Government argues, however, that waiver can be based on the fact that petitioner entered into its contracts on April 21, 1982. The Government neglects to mention that the AGBCA rejected this very argument.

The AGBCA first noted that while the Federal Court Improvements Act, Pub L No. 97-164, 96 Stat 25, was signed on April 2, 1982, the Act was not effective until October 1, 1982. Prior to that date, the Court of Claims remained intact as an Article III

tribunal. The AGBCA also found no waiver because:

> "At the time of bid submission and bid auction and the determination that Appellant was the high bidder, the FCIA had not been approved by Congress, let alone enacted or effective. Appellant could not have properly withdrawn its bid or refused award of the contracts after bid opening and being determined to be the high bidder. App B: 38a-39a.

2. The Government argues that Gregory was not entitled to try the Government's claim against it in an Article III court. The Government fundamentally misunderstands the historical role of the Exchequer court in England. Also, each case cited by the Government for the authority of non-Article III courts in contract cases is inapposite. Finally, the Government in effect concedes that this case does not

fall within the "public rights" exception.

(a) The Government's argument is based on a misconception of the role of the Exchequer.

The Government excerpts portions of Blackstone's Commentaries on the Laws of England; Pollock & Maitland's The History of English Law; and Murray's Lessee v. Hoboken Land and Improvement Co. which do not support its proposition, but reflect a misconception of the structure and role of the English courts. Suits by the English crown for money could be brought in any court, but customarily were heard by the Exchequer. The Exchequer not only managed the royal revenue, but also had within it two divisions: a court of equity and a court of common law. 3 Blackstone, Commentaries on the Laws of England 44 (Dawsons of Pall Mall, 1st ed reprint 1966). Its primary business was to enforce the royal scheme of taxation--"to call the king's debtors to account," id.--but Blackstone notes that "all

sorts of civil actions" were heard on the common law side of the court. Id. at 45. While most of the Exchequer's business was on the equity side and concerned tax matters, certain suits, such as a suit by the Government against a private citizen for breach of contract, were accorded a common law judicial hearing analogous to an Article III trial. The common law side of the Exchequer considered cases between the Government and citizens "as between subject and subject," replete with the full panoply of English rights including trial by jury. Id. at 261.

The Government's misunderstanding on this point is apparent when it cites Blackstone for the proposition that "the King's debtors were called to answer in the court of equity." Br in Opp at 7. The "King's debtors" referred to were delinquent taxpayers, who were subject to summary procedures. Similarly, the "king's debtors" referred to in Pollock & F Maitland, The History of English Law,

were taxpayers. Gregory Timber has never contended that delinquent taxpayers ever enjoyed rights of a common law trial.

This misunderstanding is further perpetuated by the Government's heavy reliance on Murray's Lessee v. Hoboken Land and Improvement Co., 59 US (How.) 272 (1855). There, a summary warrant of distress had issued from an executive officer against a Government customs collector after an audit disclosed missing funds. The Court discussed the "summary and severe" English and Colonial procedures against such "public defaulters"--procedures that did not include the right to trial by the Judiciary. Id. at 278. The Court noted that "ordinary debtors"--delinquent taxpayers--were also subject to summary process, although the process was not as severe as for "public defaulters" who make away with public monies. At no time in Murray's Lessee did the Court consider non-tax Government claims against a private

citizen who allegedly breached a Government contract.

(b) Cases cited by the Government for the authority of non-Article III courts in contract cases are inapposite.

The Government cites four cases arguing that non-Article III trial of Government contract claims against a private party can be forced. None of them supports that proposition. United States v. Moorman, 338 US 457 (1950) and United States v. Wunderlich, 342 US 98 (1951) were both actions brought against the Government, and simply uphold contractual clauses making final the Government's determination of certain questions.

Lichter v. United States, 334 US 742 (1948), permitted administrative agencies to determine whether wartime contracts would be revised and "excess profits" returned to the Treasury. The Court expressly declined to rule on the constitutionality of a "redetermination" of the excess profits by the non-Article III Tax Court, because the petitioners

had failed to seek relief. Id. at 791. Lichter does not support the constitutionality of compulsory non-Article III adjudication of Government contract claims.

Finally, United States v. Rush, 804 F2d 645 (Fed Cir 1986) stands for the narrow proposition that non-Article III courts may adjudicate Government claims against a third-party defendant where the Government's claim is for money already paid out to third parties under a contract, or where the third party asserts a claim against the Government. Rush is not authority for non-Article III adjudication of Government claims against private parties for breach of contract.

(c) The Government in effect concedes that this is not a case involving "private rights"

The Government previously contended that Gregory Timber's rights were "public rights," and thus exempt from the exclusive purview of Article III courts. It has omitted that argument in its response before this

court. Gregory Timber understands this to be, in effect, a concession that this is not a case involving the "public rights" doctrine.

3. The Government last argues that the CO's misunderstanding of their authority is immaterial because Gregory "did not prove that the Government first breached the contract by not granting extension." Br in Opp at 8. This misconceives the issue and misdescribes the Government's breach and burden.

Because the CO's believed they had no legal authority to extend the contracts they never reached the factual question of whether the new blowdown on the salvage sale justified extensions. Gregory's argument has never been that the Government materially breached by denying the extension requests. Rather, the Government was in breach when, while the contract was still in effect, the CO's misunderstood their own authority and concluded that they lacked power to grant extensions. As dissenting Judge Bissel explained:

> "*** When a request is made for an extension that could have been granted, the CO incorrectly believed that he lacked authority to grant an extension, and the grant of an extension would have avoided the subsequent default, the contract must be treated as having been terminated for the convenience of the government." App A:27a.

Judge Bissel also correctly noted that "the Government did not argue before this court and the Board did not find that the CO did exercise any legitimate or reasoned discretion in denying Gregory Timber's extension requests." (Emphasis in original); App A:25a.

Concerning the merits of Gregory's extension requests, there is only one relevant question, i.e., whether the CO's could have granted the extensions or whether they would have abused their discretion by doing so. As Judge Bissell noted, the burden is on the Government to prove that the CO's acted correctly in responding to the extension requests. App A: 26a. The Government has never argued, and the

Board and Federal Circuit did not conclude, that it would have been an abuse of discretion for the CO's to have granted extensions. Indeed, the record shows that had the CO's understood their authority, or investigated the facts, they could have granted extensions. The one Judge to have addressed this issue, dissenting Judge Bissel, rightly concluded "that the CO had the discretion to grant or deny the extensions, and was not compelled by law to either grant or deny the requested extensions." App A:25a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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